UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO - WESTERN DIVISION (DAYTON)

GAREY E. LINDSAY, Regional Director of Region 9 of the NLRB, for and on behalf of the NLRB,	)	***ELECTRONICALLY FILED***
PLAINTIFF-PETITIONER,	)	**CASE NO. 3:17-cv-00126-TMR** **The Honorable Thomas M. Rose** **Magistrate Michael J. Newman**
v.	)	
MIKE-SELL'S POTATO CHIP CO.,	)	**MEMORANDUM IN OPPOSITION TO MOTION TO ADJUDICATE BASED ON AFFIDAVIT EVIDENCE**
DEFENDANT-RESPONDENT.	)	

INTRODUCTION

Defendant-Respondent Mike-Sell's Potato Chip Company ("Mike-sell's" or "Company") hereby opposes the Motion to Proceed on Affidavit Testimony ("Motion") filed by Plaintiff-Petitioner Garey E. Lindsay, Regional Director for Region 9 of the National Labor Relations Board ("Regional Director" or "Petitioner"), on behalf of the National Labor Relations Board ("Board").

This action arises from a Complaint and Notice of Hearing ("Complaint") issued by the Regional Director on March 17, 2017, in Board Case No. 09-CA-184215. (Petition - ECF 1, Ex. 3.) The Complaint is based on an Unfair Labor Practice Charge ("Charge") filed six months earlier, on September 14, 2016, by the International Brotherhood of Teamsters, Local Union No. 957 ("Union"), alleging Mike-sell's violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("Act") by (1) not bargaining over its decision to sell sales territory to independent distributors, and (2) not providing information sought by the Union for such decisional bargaining. (Petition - ECF 1, Ex. 1.)

On April 12, 2017, the Regional Director filed a Petition for Preliminary Injunction Under Section 10(j) of the Act ("Petition"), urging this Court to set a specific briefing schedule and require Mike-sell's to "appear before the Court at a time and place fixed by the Court, and show cause" as to why an injunction should not issue. (Petition - ECF 1, p. 8 (emphasis added).) The Court granted Petitioner's briefing and hearing request in full. In accordance with the briefing schedule, on May 3, 2016, Mike-sell's filed a Memorandum in Opposition to the 10(j) Petition ("Memorandum"), summarizing its position and highlighting

certain basic facts through affidavit evidence, with the understanding there would be a full and fair opportunity to present live testimony on the "just and proper" standard at a hearing before this Court on May 12, 2017.

After having the benefit of reviewing the Company's Memorandum, Petitioner filed the instant Motion on March 5, 2017—seven days before the scheduled hearing—suddenly asking the Court to forgo live testimony and proceed instead on affidavits. But the Petition seeks an extraordinary remedy that is vastly overbroad, that disturbs the *status quo*, and that jeopardizes the financial stability of not only the Company but also other local small businesses and their individual employees. The full panoply of complex issues and multiple competing interests cannot be effectively communicated through affidavits alone, which provide no opportunity for the development and cross examination of testimony. Thus, Mike-sell's respectfully contends that, because a full evidentiary hearing is in order, Petitioner's Motion should be denied.

ARGUMENT

In its Motion, the Regional Director correctly states that petitions for injunctive relief may be decided based only on affidavits. However, the decision to forgo a hearing and proceed on affidavit evidence alone rests in the sole discretion of this Court. Typically, injunction petitions are not decided on affidavits unless all the parties agree, or unless the case involves certain facts not present here, such as boycotts, organizational campaigns, and/or returning strikers. *See, e.g.*, *NLRB v. Carey Salt Co.*, No. CIV.A. 11-0287, 2011 WL 1898923, at *3 (W.D. La. May 18, 2011) (no hearing necessary to determine whether strikers should be granted interim reinstatement where all parties agreed matter could be decided on affidavits). Moreover, where trial courts do decide to take affidavits in lieu of live testimony, the parties are properly notified of this procedural detail up-front, by a specific request in (or filed contemporaneously with) a party's initial petition or answer and granted by the court's initial show cause order. *See, e.g.*, *San Francisco-Oakland Newspaper Guild v. NLRB*, 412 F.2d 541, 544 (9th Cir.1969) (show cause order notified parties that only affidavits would be considered for purposes of 10(l) petition for injunction of secondary boycott). It would seem highly unusual for a trial court to issue a show cause order requiring the parties to appear for a hearing, only to overturn its own ruling weeks later based on a belated motion by a party seeking to make a last-minute change in strategy.

In *San Francisco-Oakland Newspaper Guild*, the Ninth Circuit found live testimony unnecessary to decide whether to issue a petition for injunction pursuant to Section 10(l) of the Act. 412 F.2d at 546. There, the employer filed an unfair labor practice charge against the union for engaging in a secondary boycott. *Id.* After the Board filed its 10(l) petition, the trial court issued an order requiring the union to show cause and simultaneously notifying the parties that all evidence would be presented by affidavit, with no live testimony heard unless thereafter ordered. *Id.* at 544. In addition to taking affidavits, the trial court also held oral arguments on the petition. *Id.* The evidence presented was in conflict, and the union argued that the trial court abused its discretion in refusing to permit live testimony. *Id.* at 546. Upholding the trial court's decision, the Ninth Circuit explained, "This is not a case where one side to a controversy was denied the opportunity to be heard," as the trial court "heard oral argument . . . [and the union was] afforded a sufficient opportunity to present their case without using oral testimony." *Id.*

Similarly, in *Carey Salt*, the trial court relied on Sixth Circuit precedent in finding that live testimony was not required to adjudicate the Board's 10(j) petition, citing *Gottfried v. Frankel*, 818 F.2d 485 (6th Cir. 1987). The employer had already conceded the "reasonable cause" prong of the section 10(j) test, so the trial court saw no reason to engage in a fact-finding exercise. 2011 WL 1898923, at *4. Furthermore, all parties had already agreed the matter could be decided on briefs and affidavits. *Id.* at *1, *3. These express concessions and agreements established that "the evidence available . . . was clearly adequate to determine whether the Board had reasonable cause to believe unfair labor practices had occurred." *Id.* (quoting *Gottfried*, 818 F.2d at 493).

Here, unlike in *San Francisco-Oakland Newspaper Guild*, the Court's Show Cause Order makes no mention of accepting affidavits as a substitute for live testimony. The Regional Director certainly had the ability to request submission on affidavits alone when filing the Petition on April 12, 2017. But Petitioner conveniently failed to make such a request until May 5, 2017, two days after Mike-sell's filed its Memorandum based on a strategy crafted in reliance upon Petitioner's specific request for—and the Court's granting of—an evidentiary hearing. The Regional Director's suspicious timing reeks of underhanded gamesmanship, as cancellation of the hearing at this late point would significantly prejudice Mike-sell's, as well as innocent third

parties whose very livelihood is jeopardized by the Petition.[1] This honorable Court should not indulge Petitioner's abrupt "about-face." Given the extraordinary remedy sought by the Regional Director, the granting of which would upset the *status quo* and have significant implications for both the Company and innocent third parties, Mike-sell's needs a full evidentiary hearing to properly defend against the Petition.

Furthermore, unlike in *Carey Salt*, Mike-sell's does not concede either prong of the 10(j) test, and the Company cannot be fully heard through affidavits or oral arguments. It is essential for this Court to hear live testimony—subject to cross examination—to determine whether a 10(j) injunction would be "just and proper." This is not a case where an injunction would simply end a boycott, resume a union campaign, or return employees to work. It instead involves complex business arrangements between not only the Union and the Company,[2] but also innocent third parties. If the Board's Petition is granted, Mike-sell's will be forced to breach existing contracts with at least two independent distributors. These distributors are small businesses that have invested their own time and money in purchasing and developing the Company's sales territory, and their investment would be irreparably undermined by an interim injunction. The distributors' very livelihood—as well as that of their employees—would be endangered, as would the continuity of service to customers. Thus, ironically, while no jobs were lost due to the four route eliminations at issue in this case, several jobs may be lost if Petitioner's requested injunction is issued.

Moreover, if the Petition were granted, it would greatly disadvantage Mike-sell's in future contract negotiations with the Union. As the Regional Director well knows, the Company and the Union have been embroiled in ongoing litigation for almost five years and have yet to negotiate a successor labor agreement. The Complaint in this case alleges only that Mike-sell's failed to bargain over the decision to sell certain sales territory, and failed to provide certain information requested for purposes of decisional bargaining. (Petition – ECF 1, Ex. 3.) In contrast to that very narrow issue framed by the Complaint, the Petition's prayer for relief is so overbroad that it seeks (among other things) a general bargaining order and a general

[1] There are no time-sensitive concerns in this case that might support interim relief absent a full hearing. Indeed, after the Charge was filed, the Regional Director waited six months to issue the Complaint and seven months to file the Petition—which expressly requests that Mike-sell's be ordered to "appear before the Court."

[2] As explained in its Memorandum, an injunction would force Mike-sell's to reacquire expensive equipment and materials; rehire non-union employees; and reassume routes for which it has no drivers.

document/information production order, not limited to the subject matter addressed in the Complaint. (Petition – ECF 1, Ex. 3.) If this Court granted the interim relief requested—without first understanding the widespread practical impact on the parties' bargaining relationship, litigation history, and ongoing Board proceedings—it would only serve to unfairly subject Mike-sell's to the constant threat of immediate contempt proceedings, even for alleged refusals to bargain or alleged refusals to produce information completely unrelated to route eliminations. Given that the Complaint does not allege overall bad faith bargaining or overall failure to respond to information requests, the Petition's prayer for global interim injunctive relief is disproportionate to the alleged harm at issue, and would lead to untenable results, especially in the absence of a hearing to flesh out all the complex issues at stake.

Where the Board seeks a preliminary injunction based on alleged violations of Section 8(a)(5) of the Act, courts in the Sixth Circuit have found evidentiary hearings and oral argument appropriate and useful. *See, e.g.*, *NLRB v. Comau, Inc.*, 767 F. Supp. 2d 778, 792 (E.D. Mich. 2011) (finding no reasonable cause for 8(a)(5) violation, and concluding injunctive relief not just and proper, based on evidence presented at hearing on petition and testimony elicited before ALJ); *NLRB v. ADT Sec. Servs., Inc.*, 379 F. App'x 483, 484–85 (6th Cir. 2010) (holding evidentiary hearing on 10(j) petition where complaint alleged 8(a)(5) violation); *NLRB v. Detroit Newspaper Agency*, 984 F. Supp. 1048, 1049 (E.D. Mich. 1997) (finding injunctive relief not just and proper after hearing and oral argument on facts at issue); *Levine v. C & W Mining Co.*, 610 F.2d 432, 434 (6th Cir. 1979) (findings based on evidence presented at hearing, including testimony of four witnesses). Thus, there is ample authority to support the enforcement of this Court's Show Cause Order requiring the parties to appear before the Court for a hearing on the Petition.

In addition, courts in the Sixth Circuit seldom forgo an evidentiary hearing unless the parties have otherwise been provided some other opportunity to be fully heard, such as a hearing on the merits before the Administrative Law Judge ("ALJ"). *See, e.g.*, *NLRB v. Voith Indus. Servs., Inc.*, 551 F. App'x 825, 830 (6th Cir. 2014) (relying on administrative record in assessing 10(j) petition); *Calatrello v. Carriage Inn of Cadiz*, No. 2:06-CV-697, 2006 WL 3230778, at *2 (S.D. Ohio Nov. 6, 2006) (hearing not necessary where court can properly determine "reasonable cause" and "just and proper" based on record from underlying unfair labor

practice proceeding before ALJ); *Calatrello v. Am. Church, Inc.*, No. 1:05 CV 797, 2005 WL 1389042, at *2 (N.D. Ohio June 9, 2005) (denying 10(j) injunction based on testimony adduced at ALJ hearing). Here, the Court will have no administrative record to rely upon for three more weeks, so absent a full evidentiary hearing, the parties and others affected by the Court's decision will not have had a meaningful opportunity to be heard if the Regional Director's Motion and Petition are granted.

Quite simply, too much is at stake in this case for the Court to decide the Regional Director's Petition on affidavit testimony alone. The Regional Director's evidentiary burden may not be heavy, but it requires more than merely asking this Court to "rubber stamp" its Petition—or any subsequent Board motions. This Court serves a pivotal role in ensuring that preliminary injunctions do not issue unless they are just and proper. Here, because of the potential hardship and disruption to multiple companies, private individuals, and customers, issuing an injunction without an evidentiary hearing to flesh out all the competing interests—and to subject key witnesses to cross examination—would be far from just and proper.

CONCLUSION

For the foregoing reasons, Respondent Mike-Sell's Potato Chip Company respectfully requests the Court deny the Regional Director's Motion.[3]

Respectfully submitted,

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[3] If the Court feels so inclined to grant the Board's Motion and proceed on affidavit testimony alone, Mike-sell's urges this Court—as an alternative—to postpone any ruling on the Petition until after the case has been tried on the merits before the ALJ, thereby creating an administrative record for this Court to consider. Allowing the ALJ to develop an administrative record before ruling on the Petition will ensure the parties have an opportunity to be heard without unnecessarily duplicating any proceedings. The ALJ hearing is set to take place on May 31st, just 19 days after the Show Cause hearing currently scheduled in this Court. Surely, a short delay of less than three weeks will prejudice neither party, as there are no time-sensitive concerns in this case that would be impacted in a mere 19 days' time. Indeed, as previously stated, the Regional Director waited six months to issue the Complaint and seven months to file the Petition after the underlying Charge was filed.

CERTIFICATE OF SERVICE

I hereby certify that this Response in Opposition to Motion to Adjudicate Based on Affidavit Evidence was electronically filed with the U.S. District Court for the Southern District of Ohio by using the CM/ECF system, which will send a notice of electronic filing to the following, with hard copies served as follows on this 9th day of May, 2017:

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